



Matheson

# Matheson Fund Finance 2022

## About Matheson

Matheson's primary focus is serving the Irish legal needs of internationally focused companies and financial institutions doing business in and from Ireland. Our clients include the majority of the Fortune 100 companies. We also advise 7 of the top 10 global technology brands and over half of the world's 50 largest banks. We are headquartered in Dublin and have offices in London, New York, Palo Alto, San Francisco and Cork. More than 775 people work across our six offices, including 105 partners and tax principals and over 530 legal and tax professionals.

Our strength in depth is spread across more than 20 distinct practice areas within the firm, including asset management and investment funds, aviation and asset finance, finance and capital markets, commercial litigation and dispute resolution, corporate, healthcare, insolvency and corporate restructuring, insurance, intellectual property, international business and tax. This broad spread of expertise and legal know-how allows us to provide best-in-class advice to clients on all facets of the law and is acknowledged by both our clients themselves and the world's leading legal directories and publications.

### Innovation

We challenge the status quo, seek better ways to work, create value for our clients and empower our people to innovate.

We act for



of the top 10  
most innovative  
companies  
in the world  
(Forbes, 2020)

### International Financial Services

We act for



**39**

of the world's  
top 50 banks



**8**

of the world's 10 largest  
asset managers

*Figures as at January 2022.*



## Fund Finance

As Ireland has been a centre of excellence for the investment fund management industry for the past 30 years, our Fund Finance practice has built up extensive knowledge and experience in acting for leading fund sponsors, investment funds and lending banks across all elements of fund finance. We assist our clients both borrowers and lenders by guiding them through the issues involved in providing finance to different forms of Irish investment fund entities including ICAVs, Unit Trusts, Investment Companies, REITs, IREFs, SPVs, Section 110 Companies, Limited Partnerships (unregulated), Investment Limited Partnerships (regulated) and Common Contractual Funds (CCFs). We are often asked to undertake due diligence on investment fund borrowers and to advise on the appropriate form of security to be implemented when providing finance to the entities mentioned above.

We also advise on NAV facilities (including hybrid variations) and portfolio level financings as well as secured and unsecured subscription (or capital call) facilities to bridge capital calls, provide working capital and/or make investments. These facilities will often be governed by English or New York law and we are increasingly being asked to implement such arrangements under Irish law.



## The Finance and Capital Markets Group

Our Finance and Capital Markets Group is consistently ranked as a leading finance and capital markets law firm in Ireland. It is the largest Irish practice of its kind in Ireland led by 14 partners with 47 finance lawyers and professionals in total. The practice includes specialist Fund Finance, Structured Finance, Aviation Finance and Transportation, Capital Markets, Derivatives, Project Finance and Distressed Assets Groups. We advise all of the major domestic and international banks and financial institutions with a presence in Ireland.

Our standing within the international finance sector and our experience in advising international financial institutions means that we are ideally positioned to advise on multi-jurisdictional cross-border financings. International financial institutions and other alternative lenders are increasingly competing with the Irish banks in terms of domestic corporate lending and our status as the 'go-to' law firm for many of these lenders has resulted in our advising on many significant and ground breaking transactions.



## The Asset Management and Investment Funds Group

Matheson is the number one ranked funds law practice in Ireland, acting for over 28% of Irish domiciled investment funds by assets under management as at 30 June 2021. Led by 12 partners, the practice comprises 60 asset management and investment fund lawyers and professionals in total. The department's expertise in UCITS and alternative investment funds is reflected in its tier one ranking by the European Legal 500 and the IFLR1000, and the team is specifically recognised for its abilities with respect to complex mandates.

With our asset management legal and regulatory advisers working alongside Matheson taxation, finance and capital markets and commercial litigation departments, we offer a comprehensive service for clients. We are one of the few law firms in Ireland with a specialist derivatives practice, which enables us to provide combined asset management, tax and derivatives advice of the highest calibre to our clients.



## 1 Overview of the Irish Funds Industry



### Introduction and Background

Ireland is widely recognised as one of the world’s most advantageous jurisdictions in which to establish investment funds. A wide range of tax-efficient fund vehicles with many different characteristics can be established in Ireland under a number of different legal structures. Different levels of regulation apply to retail and qualifying investor funds and the Central Bank of Ireland (the “**Central Bank**”) has worked closely with the funds industry to tailor its regulations to accommodate a diverse range of investment products with different structural features.

Over 900 fund managers from more than 50 countries use Ireland as part of their fund activities, 17 of the top 20 global asset managers have Irish domiciled funds and there are over 5,700 funds (and sub-funds) based in Ireland with total net assets of in excess of €3 trillion (source - Irish Funds). Our market leading Fund Finance group, together with our Asset Management and Investment Funds group, act for over 1,200 funds (source - Monterey Insight Report).



### Advantages of Ireland as a Fund Domicile

In an independent global survey of 200 asset managers commissioned by Matheson and conducted by the Economist Intelligence Unit, 71% of the managers surveyed said that they would choose Ireland as one of their top three European fund domiciles. Respondents to the survey had the opportunity to select which, in their view, are the best performing European fund domiciles under each of the following distinct categories:

- best regulatory conditions (such as regulatory sophistication, accessibility and responsiveness);
- best legal and tax framework; and
- best non-regulatory and non-tax business conditions (such as ease of doing business, service culture, local expertise in complex products).



### Regulatory Framework

Irish domiciled funds are authorised and regulated by the Central Bank. The regulatory framework is divided between UCITS (Undertakings for Collective Investments in Transferable Securities) and non-UCITS alternative investment funds (“**AIFs**”).

- The UCITS regulatory regime covers open ended investment vehicles investing in transferable securities and other liquid financial assets which are open to retail investors. Restrictions apply to the UCITS' investment and borrowing policies and to their use of financial derivative instruments. UCITS have the advantage that they can be sold without any material restriction to any category or number of investors in any EU Member State, subject to certain filing requirements.
- AIFs offer greater flexibility with respect to investment styles and borrowing restrictions. AIFs may be established as retail investor AIFs ("**RIAIFs**") or qualifying investor AIFs ("**QIAIFs**"). RIAIFs are subject to general investment diversification and borrowing restrictions whereas QIAIFs are subject only to minimal investment restrictions and are not subject to any leverage restrictions. RIAIFs and QIAIFs managed by authorised alternative investment fund managers ("**AIFMs**") can market throughout Europe to professional investors on a passported basis.



## Fund Vehicles

There are several types of legal entities and contractual arrangements available for the establishment of an investment fund in Ireland which may be used for UCITS and AIFs.

The Irish Collective Asset-management Vehicle ("**ICAV**") is a corporate fund structure. It has, amongst other things, the following characteristics:

- the ICAV is registered (incorporated) with the Central Bank and provides a tailor-made fund vehicle available to both UCITS and AIFs;
- one of the primary advantages of the ICAV is that it can elect its classification under the US check-the-box taxation rules;
- the ICAV has its own legislative regime (the Irish Collective Asset-management Vehicle Act 2015 (the "**ICAV Act**")) and therefore does not have to deal with those aspects of Irish company law legislation that would not be relevant to a collective investment scheme;
- an ICAV is not required to spread risk, facilitating a broader range of investments strategies for QIAIFs established as ICAVs; and

- the ICAV offers a range of potential benefits which reduce costs for ICAV investors, including the ability to dispense with the requirement to hold an annual general meeting, to prepare separate accounts at sub-fund level and to make changes to its constitutional document without prior investor approval once the ICAV's depositary certifies that the changes do not prejudice investors' interests and the Central Bank has not otherwise mandated that the change is of a type that must be approved by the members. The constitutional document of an ICAV is the instrument of incorporation.

A unit trust is created by a trust deed entered into between a trustee and a management company. A unit trust is a contractual arrangement and is not a separate legal entity, with the result that a unit trust does not have power to enter into contracts in its own name and the management company or trustee enters into contracts on its behalf. The trustee is registered as the legal owner of the assets on behalf of the investors, who receive units representing beneficial interests in the assets of the unit trust.

Investment companies or plcs (a corporate structure similar in many respects to an ICAV but without its own legislative regime and subject to the requirement to spread investment risk).

A common contractual fund (an unincorporated body established by a management company pursuant to which the investors, through contractual arrangements, participate and share in the assets of the fund as co-owners); or

For non-UCITS only, an investment limited partnership ("ILP") can be established under the Investment Limited Partnerships Act 1994, as amended by the enactment of the Investment Limited Partnerships (Amendment) Act 2020 for investment in assets of any kind with the authorisation of the Central Bank. An ILP is created by contract between the general partner(s) and one or more investors who participate as limited partner(s), and will be subject to the AIF (Alternative Investment Funds) Rulebook issued by the Central Bank.

The reforms introduced to the ILP pursuant to the Amendment Act 2020 (referred to above) is a significant development for the Irish funds industry and reflects an industry which is constantly seeking to develop and grow, building on the positive experiences of the many sponsors who have already established funds in Ireland. The enhanced and rebooted ILP will further strengthen Ireland's fund product range, providing an attractive vehicle for promoters seeking to establish private equity, venture capital and "real economy" investment funds in Europe. The ILP is now expected to become the fund structure of choice for many international fund sponsors, particularly those in the private equity and real asset sectors.



## Fund Structures

Each of the above structures may be subject to further variations to better suit the investment policy or distribution intentions of a fund's promoter or investment manager. For example, a fund may be structured as a separate, stand-alone fund or as an umbrella fund, with multiple, legally segregated sub-funds. All funds can be structured with different share / unit classes to accommodate different currency denominations, distribution policies, charging structures or hedging arrangements.

Funds can also be established as feeder funds, funds of funds, exchange traded funds or constant NAV money market funds, amongst others. In addition, QIAIFs can appoint prime brokers and the assets passed to such prime brokers may be pledged, lent, re-hypothecated or otherwise utilised by the prime broker for its own purpose.

In many cases, fund groups will include Irish special purpose vehicles that are usually financed by way of debt instruments. Particular consideration needs to be given as how best to (i) finance such special purpose vehicles and (ii) take security in respect of capital calls / call rights under such debt instruments.

## 2 Fund Finance in Ireland



### Fund Finance

#### 2.1 Primary Documentation

A wide range of lending structures can be used when lending to an Irish fund or sub-fund (as the case may be) including:

- bilateral and syndicated term loan facilities;
- revolving facilities (particularly in the context of capital call or subscription line facilities);
- note issuances; or
- derivative based contractual arrangements.

#### 2.2 Reflecting the Fund Structure in Primary Documentation

It is critical that the primary documentation used in a fund finance transaction reflects the overall deal and fund/sub-fund (as the case may be) structure.

In this regard, provisions, such as, but not limited to, (i) representations & warranties, (ii) general and / or if relevant Property Development undertakings and (iii) events of default should include (where appropriate and subject to negotiation) tailored provisions relating to:

- fund service providers: this can include where relevant a fund service providers such as an AIFM, a depositary/custodian (as the case may be), an investment manager or an investment advisor;
- fund documentation: this can include where relevant, a prospectus (and supplements (if any)), an AIFM agreement with a depositary/ custodian agreement, an investment management agreement or an investment advisor agreement;
- subscription line arrangements: ensuring certain definitions and concepts from the underlying subscription agreements and partnership agreements/deeds are reflected in the primary financing document. Certain protections for the lender in respect of investor side letters may also be required; and
- regulatory matters: the underlying regulatory regime and provisions dealing with Central Bank supervision.

## 2.3 CPs

It is also important to ensure that the conditions precedent (usually referenced in the primary documentation) reflect the overall (i) financing structure, (ii) fund structure and (iii) the underlying regulatory regime. Such CPs can include where relevant, Central Bank approval/authorisation documents, the prospectus and (any supplements), constitutional documents, customary corporate approvals and fund service provider documentation.

## 2.4 Credit Support

Depending on, amongst other things, (i) the deal/fund structure (see 1.4 (Fund Vehicles) and 1.5 (Fund Structures) above and (ii) the underlying investments of the fund in question, security packages may comprise of:

- a charge over a depositary/custodian account (this would be very common in fund finance transactions);
- a mortgage debenture (incorporating fixed and floating asset security over various assets);
- a charge from the relevant shareholder(s) over the shares in a fund (or shares attributable to a sub-fund);
- an account control agreement (see below);
- duty of care agreements from certain fund service providers in favour of the relevant finance parties;
- where relevant, a charge over the partnership interests in a partnership; and
- for capital call or subscription line facilities, an assignment of all of the fund's rights to call and receive the unfunded capital commitments.

## 2.5 Account Control Agreement

In addition to a charge over a depositary/custodian account, typically a lender and a fund or sub-fund (as borrower) may enter into an account control agreement ("**ACA**") with the borrower's depositary/custodian pursuant to which, amongst other things:

- the depositary/custodian acknowledges the creation of the security by the borrower and agrees that it will not object to the security or the secured parties' rights thereunder;
- the depositary/custodian acknowledges it has no interest in or title to the secured assets that would adversely affect the security;
- if the depositary/custodian has signing rights to any of the accounts, then the ACA will set out the provisions regarding the operation of those accounts;
- in a blocked account scenario - the ACA provides that the borrower will have no access to the funds in the account(s) and that the lender or security agent will have complete control and consent rights over withdrawals; and
- in a springing account control scenario, the ACA will include a mechanism whereby the depositary/custodian acknowledges that, upon receipt by it of an enforcement or blocking notice from the lender (or security agent), it will act solely upon and comply with the lender's (or security agent's) instructions.



## 2.6 Security Filings

Subject to certain exceptions (see below), depending on whether the fund or sub-fund is an investment company under the Companies Act 2014 or established under the ICAV Act, the particulars of certain charges created by it must be delivered to the Irish Companies Registration Office or the Central Bank (as the case may be) not later than 21 days after the date of creation of the charges.

Similar to the Companies Act 2014, a charge created over (a) cash, (b) money created to the account of a financial institution, (c) shares, bonds or debt instruments, (d) units in a collective investment undertakings or money market instruments or (e) any claims and rights in respect of (a) – (d) does not require to be registered under the ICAV Act. However, each security document should be assessed on a case by case basis to ascertain if the exemption applies.

Depending on the type of assets charged, certain other filings may be required in other registrars (eg. the Property Registration Authority of Ireland).

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### Some Recent Examples of our Transaction Experience

- Advised an Irish borrower and obligors in connection with a \$1 billion subscription facility from an international credit institution as part of a US based investment manager's senior direct lending fund involving Irish, Cayman and Delaware vehicles;
- Advised an Irish special purpose vehicle and its subsidiary in connection with a \$1 billion asset backed facility providing leverage to a US based investment manager's senior direct lending fund;
- Advised an international credit institution in relation to a €112 million term facility to an Italian real estate vehicle which was a subsidiary of a sub-fund of an ICAV;
- Acted for a specialist bank and asset management group in relation to a loan of €15 million to an English LLP with an Irish AIFM providing a guarantee and associated credit support in respect of the facility;
- Advised a European investment vehicle in the form of an Irish SPV as a borrower under a \$80 million subscription facility with an international credit institution as part of a US based manager's US loan origination platform;
- Advised an Irish SPV as borrower under a \$2.5 billion credit facility to be used by its US based investment manager for the purposes of making investments on behalf of the Irish SPV;



- Advised an Irish SPV as borrower in relation to a \$30 million term loan facility provided by a US specialty finance firm;
- Advised an Irish SPV in connection with a secured subscription-line facility of \$90,000,000 entered into with an international credit institution and associated credit support documentation, including cascading security;
- Advised a leading alternative investment manager in connection with a secured subscription line facility to the value of up to \$2 billion with an international bank;
- Advised an international bank in respect of its assignment of a capital call facility and confirmation of existing cascading security arrangements with an Irish SPV;
- Advised an international bank in relation to a facility of up to \$100 million made available to the sub-fund of an Irish unit trust;
- Advised an international bank in relation to a facility of \$120 million made available to multiple sub-funds of an Irish ICAV pursuant to an umbrella facility agreement; Advised an international bank in relation to a number of facilities up to \$250 million made available to various sub-funds of an Irish ICAV;
- Advised an Irish ICAV in respect of facilities of \$131 million being advanced to its sole shareholder, a bankruptcy remote special purpose Delaware LLC by an international credit institution and associated credit support;
- Advised an Irish Limited Partnership in respect of a revolving credit facility of \$175 million advanced by an international credit institution;
- Advised an Irish ICAV in respect of asset backed credit facilities of \$300 million advanced to its sub-fund by an international bank;
- Advised a leading global financial institution in relation to the provision of secured facilities of EUR 425 million to a market leading investment manager pursuant to a margin loan agreement.
- Advised a Lux special limited partnership in respect of capital call financings to the value of \$400 million and related security provided by the Lux special limited partnership and by an Irish closed-ended investment company with variable capital; and
- Advised an Irish closed-ended investment company with variable capital in respect of (1) the release of existing security and the termination of an existing facility and (2) capital call financings to the value of \$250 million and related security provided by the Irish closed-ended investment company with variable capital.



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